FILE COPY

IN THE

Supreme Court of the United States

October Term, 1960

No. 340

INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO, HAVERHILL TYPOGRAPHICAL UNION NO. 38, WORCESTER TYPOGRAPHICAL UNION NO. 165, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

BRIEF FOR PETITIONERS

GERHARD VAN ARKEL
HENRY KAISER
GEORGE KAUFMANN
1730 K Street, N. W.
Washington 6, D. C.

ROBERT M. SEGAL
ARTHUR J. FLAMM
11 Beacon Street
Boston 8, Massachusetts.

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

INDEX OF CITATIONS

CASES: Page

STATUTORY PROVISIONS:

LEGISLATIVE MATERIALS:

MISCELLANEOUS:

IN THE

Supreme Court of the United States

October Term, 1960

No. 340

INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO, HAVERHILL TYPOGRAPHICAL UNION NO. 38, WORCESTER TYPOGRAPHICAL UNION NO. 165, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 278 F. 2d 6. The Decision and Order of the National Labor Relations Board is reported at 123 NLRB 806.

JURISDICTION

The decree of the Court of Appeals was entered on May 10, 1960. A petition for rehearing was denied without opinion on June 10, 1960. The petition for a writ of certiorari was filed on August 18, 1960, and granted on November 7, 1960, 364 U.S. 878 (R. 529).

STATUTES INVOLVED

The case involves Sections 2(3), 2(11), 8(a)(3), 8(b)(1), 8(b)(2), 8(b)(3), 8(d), 9(a), 10(e), 13 and 14(a) of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), which are printed as Appendix "A" to the brief.

QUESTIONS PRESENTED

1. Whether a contractual proposal made in the course of collective bargaining negotiations by a union that,

> "The General Laws of the International Typographical Union, in effect at the time of execution of this agreement, not in conflict with federal or state law, shall govern relations between the parties on those subjects concerning which no provision is made in this contract,"

and a strike to secure agreement on such proposal, violates Section 8(b) of the National Labor Relations Act as amended (61 Stat. 136; 29 U.S.C. § 151 *et seq.*).

2. Whether contractual proposals by a union that,

> "The operation, authority, hiring for and control of each composing room shall be vested exclusively in the office through its representative, the foreman, who shall be a member of the Union . . . The Union shall not discipline the foreman for carrying out written instructions of the publisher or his representatives authorized by this Agreement,"

and a strike to secure agreement on such proposals, violates Section 8(b) of the Act.

3. Whether the Order of the National Labor Relations Board, as modified by the Court below, is excessively broad within the rule of *NLRB* v. *Express Publishing Co.*, 312 U.S. 426.*

4. Whether the Board and the Court below properly held that the International Typographical Union was jointly responsible with two of its subordinate local unions for the alleged unfair labor practices.*

STATEMENT

A. Proceedings Before the Board

On separate charges filed by the Haverhill Gazette Company, Haverhill, Massachusetts, against Haverhill Typographical Union No. 38 and the International Typographical Union (hereinafter "ITU"), and by the Worcester Telegram Publishing Co., Worcester, Massachusetts, against Worcester Typographical Union No. 165, and the ITU, a consolidated hearing was held which, after the usual proceedings, resulted in the Decision and Order of the Board of April 17, 1959 of which review was sought in the Court below.

As the Court below noted (R. 515), "There is little dispute over the facts". At Worcester, Local 165, which had represented the composing room employees of the employer for some 70 years, sought from 1954 to 1957 to achieve an acceptable agreement; failing in this objective, its members went on strike in November, 1957. The course of the negotiations is set forth in R. 424-435. At Haverhill, Local 38, which likewise represented the composing room employees, had not had an agreement with the Company since 1947. In December, 1956, that Local presented proposals for an

* Questions 3 and 4 are present here pursuant to footnote 1 of the petition, pp. 2-3.

agreement; failing to achieve a satisfactory settlement, its members too went on strike in November, 1957. The course of these negotiations is set forth in R. 435-443.[1]

In both cases the union and the employer were apart on a great many issues, including wages and other economic matters about which no legal question was ever raised. (R. 73, 123-127, 205; 434, 442). The record is clear, and the Board found, that the unions were honestly desirous of obtaining contracts. (R. 456). The Board, however, viewed the strikes exclusively in terms of the jurisdiction clause, the apprenticeship and seniority "systems", and the Laws and foreman clauses, set forth above under "Questions Presented". Only the Laws and foreman clauses are now before this Court.

With respect to the Laws clause, the critical finding of the Trial Examiner, which was adopted by the Board, was that "there is no evidence in the record remotely suggesting that the Respondents (the Unions) were not seeking to include all the general laws, including those found unlawful herein, in the proposed contracts" (R. 455), despite the plain language of the clause which would exclude any General Laws "in conflict with federal or state law." Relying on certain decisions of the Second Circuit, stemming from *Red Star Express Lines* v. *NLRB*, 196 F. 2d 78, 81, it was further held that "a 'savings clause' of this general character is ineffective to eliminate the illegal provisions of the General Laws" (*id.*).

The Trial Examiner, in findings which were accepted by the Board, held that the foreman clauses

[1] The history of these negotiations constitutes the major portion of the evidence. The record, however, also contains testimony and exhibits regarding the origin, meaning and lawful application of the proposals challenged in the complaint. (R. 94-100, 254-345, 389-394).

violated Sections 8(b)(1)(B), 8(b)(2) and 8(b)(3) of the Act. As the Court below noted, "The reasoning by which the trial examiner and the Board reached this conclusion is fragmentary and far from clear" (R. 521). Chief reliance was placed on the Board's decision in *Enterprise Industrial Piping Company*, 117 NLRB 995, which the Trial Examiner characterized as holding that "where employers entrust their hiring to foremen who are members of the union and bound by its laws, they in effect agree with the union, through the foremen who are agents of employers and the union, to operate under a closed shop arrangement, which is prohibited by the Act" (R. 449, n. 6). Also relied on was the decision of the Court of Appeals for the Seventh Circuit in *American Newspaper Publishers Association* v. *NLRB*, 193 F. 2d 782 (1951), *cert. den.* 344 U. S. 816.

The Board additionally reversed (R. 481, n. 2) the finding of the Trial Examiner (R. 452-454) that the unions' demands for apprenticeship and priority "systems" did not violate Section 8(b)(2) of the Act. It "found it unnecessary to pass upon" the finding that the strike for the jurisdiction clause violated Section 8(b)(2), but did find that the strike for the Laws and foremen clauses violated that Section (R. 481, n. 2). It sustained the finding (R. 455-456) that by demanding the jurisdiction, Laws and foremen clauses the petitioners had refused to bargain collectively within the meaning of Section 8(b)(3). It approved (R. 481, 483) the finding of the Trial Examiner (R. 459, 461) that the ITU was jointly responsible with the local unions for the unfair labor practices.

The Board's Order restrained the Respondents from insisting upon "acceptance of the jurisdiction, foreman, and general laws clauses" (R. 462, 464), or from engaging in strike action for the "purpose of forcing [the employer] to execute an agreement requiring membership in the International Typographical Union as a condition of employment" (*id.*), or from "restraining [the employer] in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances" (*id.*); affirmatively ordered the Respondents to bargain collectively, and directed the posting of notices.

B. Proceedings in the Court Below

On petition for review, and the Board's cross-petition for enforcement, the Court below refused to enforce those portions of the Board's order dealing with the jurisdiction clause (R. 518-520, 527) and the apprenticeship and priority "systems".[2]

With respect to the General Laws clause, the Court enforced the Board's holding. It first rejected the petitioners' claim that the clause did not import into the agreement any General Law under circumstances where observance of its terms would entail a violation of federal or state law by noting (R. 524, n. 13) that,

---

[2] While the Court did not discuss the legality of the apprenticeship and priority "systems" in its Opinion, its decree leaves no doubt that it refused to enforce these holdings. It modified the form of Order adopted by the Board to outlaw only practices "persuasively related to" those found to be unlawful; that is, the "laws" and foremen clauses (*id.*), and amended the form of the notice to be posted (See R. 466, 468) by likewise substituting the words "persuasively related to" (the practices found to be unlawful) for the word "other" (R. 527).

> "The unions insist that in this case the clause should be called an 'exclusionary clause'. We see no significant difference in the terminology to be employed. We are not deciding this case on an issue of semantics".

But it then promptly proceeded to decide that all General Laws were incorporated in the proposed agreement by stating (R. 524, n. 14) that,

> "We perceive no reason why the coercive effect of the illegal clauses would be lessened if, as in this case, *they are incorporated by reference into the contract*, rather than written into the contract itself." (emphasis supplied)

The Court relied heavily on *Red Star Express Lines* v. *NLRB*, 196 F. 2d 78, 81 (CA 2) and *NLRB* v. *Gaynor News Co.*, 197 F. 2d 719, 723 (CA 2) *aff'd on other grounds*, 347 U.S. 17, holding that where an agreement is unlawful on its face, a "savings clause" will not cure the defect, although conceding that "The question is not free from doubt." (R. 525).

The Court below sustained the Board in holding the foreman proposals illegal. The Board had made no finding concerning the undisputed fact that these proposals specifically provided that "The Union shall not discipline the foreman for carrying out written instructions of the publisher or his representatives authorized by this Agreement." The Court (R. 521) stated that "The reasoning by which the trial examiner and the Board reached this conclusion [that these clauses were unlawful] is fragmentary and far from clear." Nevertheless the Court found a violation of Section 8 (b) (1) (B) on the ground that

> ". . . by insisting that the foremen must be union members, the unions were restraining and coercing

> the employers in the selection of their representatives for grievance adjustment purposes. Not only would the clause as proposed by the unions limit the employer's choice of foremen to union members, but it would also give the unions power to force the discharge or demotion of a foreman by expelling him from the union." (R. 521-22)

In finding a violation of § 8 (b) (2) the Court did not follow the reasoning of the Trial Examiner and the Board that these clauses would "in effect" constitute an agreement to operate "under a closed shop arrangement" (R. 449). Rather, it held (R. 522) that,

> "the effect of the clause would be to cause the employers to discriminate in favor of union men in appointing their foremen, thereby encouraging aspirants for that position to join the union".

Despite the finding of the Trial Examiner, which was not disturbed by the Board or the Court, that ". . . the Respondents . . . were desirous of securing contracts with the Companies" (R. 456), the Court sustained the holding that in making allegedly unlawful demands the unions refused to bargain in good faith as required by Sections 8(b)(3) and 8(d) of the Act. (R. 522). The Court described the union demands as "clauses of honestly disputable validity at the time of the union action" (R. 525), but held that the unions were "acting at their peril" (R. 525-26) and that "to hold that good faith is a defense to the charge of refusal to bargain when the contract provision is illegal *per se* is to put a premium on ignorance of the law or blind intransigency" (R. 522-23). The Court held that the ITU was jointly responsible with the local unions for the asserted unfair labor practices (R. 526), and,

holding that the Board's order was too broad, modified it by striking the words "in any manner" from the Order and enjoining only the specific practices found to be unlawful, "or practices persuasively related thereto" (R. 526-27).

SUMMARY OF ARGUMENT

Petitioners contend that the "General Laws" clause is entirely lawful because of the proviso which excludes from the Unions' proposals any General Law "in conflict with federal . . . law . . .". While certain of the General Laws contemplate closed-shop conditions, such laws have an entirely valid field of application in enterprises not affecting interstate commerce and in Canada. The proviso makes it clear that in other circumstances any laws requiring closed shop conditions are not to be applied, and the General Laws themselves, in Article XIV, expressly so state.

The contract proposals here in issue contained no union security clause of any kind. They made it clear on their face that competence and experience, not union membership or nonmembership, were the sole criteria for hire. Thus any General Law calling for closed shop conditions would be in conflict, not only with federal law, but with the agreement itself, as set forth in the proviso. The Board in this case reached its decision by conveniently ignoring the proviso altogether. It has urged that all General Laws are "incorporated by reference" in the agreement, despite the proviso. This is simply untrue.

Though the language of the General Laws clause has been in use since passage of the Taft-Hartley Act in 1947, to the full knowledge of the Board and the General Counsel, it has not during that period been alleged

or proven that any General Law has in fact been unlawfully applied. As will appear, the Board's principal argument has been that this clause creates "uncertainty" in the minds of employees. But collective agreements of necessity contain large areas of uncertainty, and uncertainty is not "restraint or coercion" within the meaning of Section 8(b)(1)(A), nor does it "cause" or "attempt to cause" discrimination within the meaning of Section 8(b)(2). The parties to collective agreements cannot conceivably write them with such specificity as to negative all possibility of unlawful conduct under them. While it is dubious whether contract language can ever be said to "restrain or coerce", or to "cause or attempt to cause" discrimination, the farthest conceivable reach of the Board's power is to state whether a proposed agreement contains language clearly violative of the Act. Since the proposals here made are entirely lawful on their face, the line of authorities represented by *Red Star Express Lines* v. *NLRB*, 196 F. 2d 78 (CA 2), holding that a "savings clause" is inadequate to cure a contract illegal on its face, has no application, for here there is no illegal union security clause to save, and hence no savings clause is necessary in the agreement. The decisions of the Court of Appeals for the District of Columbia in *Honolulu Star-Bulletin* v. *NLRB*, 274 F. 2d 567 (1959) and of the Court of Appeals for the Second Circuit in *NLRB* v. *News Syndicate Co., et al.*, 279 F. 2d 323, *cert. granted*, 364 U.S. 877, No. 339, this Term, so holding, are correct.

The holdings of the Board and the Court below that the demand for the foremen clauses violated the Act are erroneous. Section 8(b)(1)(B) was not violated, for there was no dispute as to who the foremen should be, and hence the petitioners were not seeking to influ-

ence, let alone "restrain or coerce", the employers in their "selection" of a foreman. Congress did not outlaw a strike for a contract clause which it expressly made lawful in Sections 2(3), 2(11) and 14(a) of the Act. Section 8(b)(2) was not violated, for the foreman is the agent of the employer, not of the Union, and is required to observe the terms of the applicable collective bargaining agreement rather than union rules, except such rules as may lawfully be enforced. The mere potential of discrimination which inheres in the hiring of a union (or a nonunion) foreman does not violate the Act.

In demanding these two clauses, the petitioners did not refuse to bargain collectively. The sole ground for so holding is that they are unlawful. A dispute in the course of collective bargaining negotiations concerning the legality of proposed clauses does not show a lack of "good faith". In any event, the petitioners here had the strongest grounds for a reasonable belief that the demanded clauses were lawful. This Court has repeatedly reminded the Board that it is not its function to supervise the terms of negotiated agreements; in this case, despite these admonitions, the Board seeks to go the further step of supervising mere proposals put forward in good faith in the course of negotiations.

The Board's Order, as enforced by the Court below, would restrain the petitioners from demanding the Laws clause in any form. But the great bulk of the General Laws are lawful and, indeed, have not been challenged in any proceeding. The Board therefore seeks to eliminate many practices which have not been the subject of a complaint, hearing, finding or Court review, and to throw out lawful conduct as well as that found to be unlawful. This the Board may not do.

NLRB v. *Express Publishing Co.*, 312 U.S. 426 (1941). Its order with respect to the foreman clause is equally improper.

The Board and the Court below erred in holding that the ITU was, along with its locals, the "exclusive bargaining representative of the employees" and thus jointly responsible with its two local unions for the practices found to be unlawful.

ARGUMENT

1. The "General Laws" Clause Is Valid

This clause, as proposed by the local unions, reads (R. 351, 398),

> "The General Laws of the International Typographical Union, in effect at the time of execution of this agreement,[3] not in conflict with federal or state law, shall govern relations between the parties on those subjects concerning which no provision is made in this contract".

In another proceeding, *Matter of International Typographical Union*, 86 NLRB 951 (1949), at page 970, a Trial Examiner found that,

> "The General Laws are traceable in their origin to the original custom of the Union—prevailing generally before collective bargaining contracts were first negotiated about 1886—of adopting scales of prices and operating rules of conduct, setting the conditions on which union members agreed to sell their services. . . . The requirements of the General Laws are considered by the ITU to represent the floor upon which the structure of collective bargaining is erected. Locals bargain for wages and economic conditions not covered by the laws, or only partially covered; and where minimum conditions are prescribed, they may bargain

[3] At Haverhill, the phrase read "effective January 1, 1956".

for more than the minimum. But they may not, without contravening the "laws", bargain away what the "laws" provide. General Laws are adopted, and may be amended, at ITU conventions, taking effect at the beginning of the succeeding year. In practice such laws are adopted only after the subject matter covered has won general acceptance in the industry, largely as a result of collective bargaining by the larger locals. Their adoption into the General Laws is designed to bring stragglers into line, to stabilize working conditions in the industry, and to achieve industry-wide standardization considered desirable in view of the mobility of printers as a craft".

The General Laws thus represent the benchmarks of trade unionism in this industry for over a century.[1] (R. 274). They are the means by which the members of the ITU, through elected convention delegates, or through direct membership referendum vote, may exercise a voice in determining their conditions of labor, and they have thus fostered the high degree of internal democracy which observers attribute to the ITU.[2]

It is not disputed that certain of the General Laws, which antedate the passage of the Taft-Hartley Act,

---

[1] A valuable discussion of the origins and early development of the General Laws is to be found in Professor George E. Barnett, *The Printers; A Study in American Trade Unionism*, Amer. Econ. Ass'n Quarterly, 3rd Series. v. 10, October, 1909. See particularly pp. 32, 37, 209, and *passim* elsewhere.

[2] See Lipset, Trow and Coleman, *Union Democracy*, pp. 3-4 (1956); Magrath, *Democracy in Overalls*, 12 Industrial and Labor Relations Review 501, 511-15 (July, 1959); Bromwich, *Union Constitutions*, A Report to the Fund for the Republic, July, 1959, p. 39.

contemplate the existence of closed shop conditions.[6] But these General Laws have a wholly valid field of application in enterprises not affecting interstate commerce, of which there are many in the printing industry, and in Canada, where the ITU has many locals and where the Taft-Hartley Act has no application. (R. 278, 325). Immediately after passage of the Taft-Hartley Act, the General Laws clause was revised to insert the language "not in conflict with federal or state law" (R. 274, 280; *Matter of ITU*, 86 NLRB 951, 1003). The legality of this clause therefore comes down to the single issue whether this proviso is sufficient. We say that it is.

There is in this record no evidence whatsoever of "restraint or coercion" on the part of the petitioners; indeed, the allegations of the complaint so charging were dismissed (R. 465). Rather obviously, the failure to obtain a desired agreement cannot be said to "cause" discrimination within the meaning of Section 8 (b) (2). The Board is therefore relegated to the position that the contract proposals here in issue were an "attempt" to cause discrimination within the meaning of that section. But, as Mr. Justice Holmes pointed out in *Commonwealth* v. *Peaslee*, 177 Mass. 267, 59 N. E. 55, 56,

> "Preparation is not an attempt. It is a question of degree. If the preparation comes very near to

[6] Nevertheless, we confess that we are at a loss to understand the inclusion of some in the General Counsel's complaints; for example, Article 1, Section 5 (R. 6, 78), forbidding apprentices to change employers without the written consent of the president of the ITU local union, is a sensible regulation designed to prevent the "pirating" of promising apprentices by other employers, which may interfere with their training, and has no relationship of any kind to union membership or non-membership.

> the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a *locus poenitentiae*, in the need of a further exertion of the will to complete the crime."

To the same effect see *Swift & Co.* v. *United States*, 196 U. S. 375, 396; *United States* v. *Coplon*, 185 F. 2d 629, 633 (CA2, L. Hand, J.); *Commonwealth* v. *Kennedy*, 170 Mass. 18, 20; 48 N. E. 77. Can it properly be said that a proposal made in the course of bargaining negotiations comes "very near to" actual discrimination?

It is equally clear that the concept of "attempt" involves an element of motive; the taking of steps toward an ultimate, desired goal. *Swift & Co.* v. *United States, supra.* Since *NLRB* v. *Jones & Laughlin Steel Co.*, 301 U. S. 1 (1937) it has not been doubted that "motive" is an essential element of "discrimination". The record here is barren of any evidence that the petitioners sought, proximately or ultimately, to cause discrimination; the evidence is overwhelmingly to the contrary (R. 156-58, 161-63, 204, 268-69, 338-345). Without proof of an improper motive, the finding of "attempt" must fall.

Manifestly, it cannot be asserted that a clause which specifically excludes from the agreement any General Law "in conflict with federal or state law" is unlawful on its face. Rather, the Board has fried a variety of indirect approaches to reach the result that such an agreement is unlawful.

The Congress "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *Morissette* v. *United States*, 342 U. S. 246, 263 (1952).

The first is the most convenient—and most inexcusable—formula, followed in this case, of simply ignoring the proviso.[8] The finding of the Trial Examiner, adopted by the Board, that "there is no evidence in the record remotely suggesting that the Respondents were not seeking to incorporate all the general laws, including those found unlawful herein, in the proposed contracts" (R. 425) blithely ignores the plain meaning of clear language and undisputed testimony.[9] We do not feel that it merits further discussion.

The second technique is that of asserting that, despite the plain language of the proviso, its intention is to incorporate all General Laws by reference, rather than to exclude from the agreement those General Laws

---

[8] This was also the technique of the complaints. (R. 4, 8; 13-14, 18).

[9] The 1948 Convention of the ITU approved the action of its Executive Council in making it "clear generally that only those union laws not in violation of the Taft-Hartley Act . . . are recognized as valid by not asking that any matter be governed by union laws which are in violation of any Federal . . . law" (R. 280). In 1953 an amendment to the General Laws was adopted which suspends the observance or enforcement of any General Law where such action would "be contrary to public law" (R. 281). The ITU has so administered this clause (R. 284, 389-94). Employers under such form of agreement could assert that application of a particular General Law was unlawful (R. 284).

This was also made clear in the course of these negotiations. The Union at Worcester made clear their willingness to negotiate into the agreement any matter covered by the General Laws (R. 215, 216, 234-235). At Haverhill as well, the Union negotiators made it clear that "any laws that are in violation of Taft-Hartley are suspended" (R. 88). A representative of the New England Publishers Association, who participated in the Haverhill negotiations, testified that no problem concerning this matter had arisen in his experience in New England (R. 89).

in circumstances where enforcement might lead to a violation of Federal law. This approach was accepted by the Court below. It first attempted to evade the issue by treating this question of contract interpretation as an "issue of semantics" (R. 524, n. 13). But it then went on to hold (R. 524, n. 14) that,

> "We perceive no reason why the coercive effect of the illegal clauses would be lessened if, as in this case, *they are incorporated by reference into the contract,* rather than written into the contract itself." (emphasis supplied).

Thus the Board and the Court below distort the meaning of clear language to achieve a reading directly the opposite of that which was intended, concerning which the testimony is entirely undisputed. In *NLRB* v. *News Syndicate Co. et al.*, 279 F. 2d 323 *cert. granted*, 364 U.S. 877, No. 339, this Term, the Second Circuit held that the "real thrust" of the opinion of the Court of Appeals for the District of Columbia in *Honolulu Star-Bulletin Ltd. et al.* v. *NLRB*, 274 F. 2d 567[10] was

> "its rejection of the same incorporation by reference argument here urged. Indeed, in an earlier case before the Board, a trial examiner found similar contractual provisions valid and he rejected the 'incorporation by reference theory' here advanced. The Board, at that time, did not object to his ruling. *Matter of Kansas City Star Co.*, 119 NLRB 972." 279 F. 2d 323 at 328, n. 10.

Chief Judge Prettyman, in *Honolulu Star-Bulletin*, succinctly observed,

---

[10] These cases will be referred to hereinafter as the *News Syndicate* and *Honolulu Star-Bulletin* cases respectively. The Board did not seek certiorari in the *Honolulu Star-Bulletin* case.

> "Section 24 (c), [the laws clause] as shown by the above quotation, clearly provided that the General Laws of the Union in conflict with either Federal law or the contract itself were not included in the contract. A closed-shop provision would have been in conflict with the federal law and also in conflict with Section 2(a) of the contract. Any such provision in the General Laws was excepted from inclusion in this contract. We do not see how language could have been clearer". 274 F. 2d at 569.

A closely related Board effort to invalidate an agreement lawful on its face was recently repudiated in *Perry Coal Co.* v. *NLRB*, 47 LRRM 2208, 2211 (CA7, December 2, 1960). There, the Court emphatically reaffirmed its decision in *Lewis* v. *Quality Coal Corp.*, 270 F. 2d 140, (CA 7) *cert. denied*, 361 U.S. 929, which had distinguished the *Red Star* line of cases and sustained the legality of a contract clause reading, "it is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers to *the extent and in the manner permitted by law*". 270 F. 2d at 143 (Court's emphasis). Accord: *Fentress Coal and Coke Co.* v. *Lewis*, 264 F. 2d 134 (CA 6) *aff'g* 160 F. Supp. 221 (MD Tenn.); *Lewis* v. *Hixson*, 174 F. Supp. 241 (WD Ark.); and *Lewis* v. *Kerns*, 175 F. Supp. 115 (SD Ind.).

The final approach was also accepted by the Court below. Relying on the line of cases in the Second Circuit holding that a "savings clause" is insufficient to cure an agreement otherwise unlawful on its face, principally *Red Star Express Lines* v. *NLRB*, 196 F. 2d 78 (1952), the "not in conflict with . . . law" proviso to the Laws clause was equated with a "savings clause". The Court below (R. 524) cited those cases as authority for the proposition that

> "... the question is not only whether under principles of contract law a 'savings clause' addendum to a contract containing an illegal union security clause would contractually negative the illegal union security clause, but whether it would have the effect of preventing the coercion that would otherwise follow"

from the inclusion of the illegal clause in the contract. It cited (R. 525) the language of the Second Circuit that "The vague language of the addendum would not help the ordinary employee to understand that the union security clause was no longer binding".

These formulations are treacherous. The basic issue, we suggest, is the identity of the tribunal which is to decide the legality of an agreement. Traditionally, this task has rested with the parties and their legal advisers, administrative tribunals, and the courts; not with laymen. It is a repudiation of the professional competence of those trained in the law to suggest that they are not better able to make these judgments than those who lack such training. Yet it is now suggested that the "ordinary employee" is to be the judge. Judge Learned Hand, dissenting in *Red Star Express*, saw this quite clearly:

> "... I cannot agree, if, although they drew their contracts in an honest effort to conform to the law, they drew them so inartificially that the meaning was not clear. Everyone will agree that the inept draughting of a contract cannot be an unfair labor practice". 196 F. 2d 78 at 81-82.

Chief Judge Prettyman, in *Honolulu Star-Bulletin*, was even more explicit. He pointed out that

> "... the Board says that, since the contract mentions the Rules of the Union, employees would have the impression that the Rules were incorporated in their entirety, and would not differentiate those

> contrary to law or to the contract. From that premise the Board reasons that the contract is *per se* a closed-shop contract. This conclusion is a complete *non sequitur*. An erroneous impression of plain terms does not change the meaning of the plain terms. Furthermore, assumptions that employees will not understand a lawful contract cannot be the basis for holding the contract illegal. What would be the justification for emphatic insistence upon formal collective bargaining as to terms of employment, if the conduct of the parties thereafter is to be judged by *speculative*, uninformed impressions of those terms instead of by the terms themselves as hammered out at the negotiation table?" 274 F. 2d at 570. (emphasis supplied).

We particularly underscore the word "speculative" in the above quotation. The "ordinary employees" who the Board urges are now to decide the legality of contractual language are non-existent, since they are to be found only in the Board's mind. They can hear no testimony, read no briefs, render no judgment. They can be endowed with any qualities the Board may think appropriate, such as the inability to understand the plain meaning of clear language and a morbid suspicion bordering on paranoia. Even Franz Kafka has never postulated so surrealist a jurisprudence: that the conduct of the citizen is to be judged by a non-existent, unreachable, tribunal. This is a *deus ex machina*, contrived solely to bridge the gulf between an agreement lawful on its face and the Board's anxiety to find the contract unlawful."[11]

---

[11] This Court's careful consideration of the reach of Section 8(b)(1)(A) in *NLRB* v. *Drivers Local Union*, 362 U.S. 274, 281, 292 (1960) at last Term makes it appropriate to inquire whether contractual language can ever violate the Act. Under the doctrine

That this is mere speculation on the part of the Board is demonstrated by the fact that the Board has never alleged or found that any General Law has ever been illegally applied under this form of agreement (R. 99), although it has been in use, to the Board's knowledge, since 1948 [see *Matter of ITU*, 86 NLRB 951, at pp. 1002-1006, 1017-1020; *Evans v. ITU*, 81 F. Supp. 675, 686 (ND Ind.)]. Moreover, in *Honolulu Star-Bulletin*, 274 F. 2d at 569, and *News Syndicate*, 279 F. 2d at 331-333, the Courts found that practices under such agreements had been lawful.[12] Even under the Wagner

---

of that case, such language cannot be said to "restrain or coerce" employees within the meaning of that Section. A contract cannot, until some action is taken under it, "cause" discrimination within the meaning of Section 8 (b) (2), and if and when such action is taken, the statutory protections are available. (But *cf. National Maritime Union*, 78 NLRB 971, *enf'd* 175 F. 2d. 686, (CA 2), *cert. den.*, 338 U.S. 954. With all due respect to an exemplary opinion, we suggest that Judge Hincks spoke elliptically in *News Syndicate*, in stating that the "test is whether the natural and foreseeable consequence of the language adopted is to encourage union membership." 279 F. 2d at 328. The making of a collective agreement, and any terms favorable to employees therein contained, rather obviously encourage union membership. The first test must still be whether there has been "discrimination" within the meaning of Section 8 (a) (3), and hence of Section 8 (b) (2). *Radio Officers v. NLRB*, 347 U.S. 17, 42-44 and see the able discussion in *Pittsburgh-Des Moines Steel Co. v. NLRB*, 47 LRRM 2135 at pp. 2139-2141 (CA9, Nov. 15, 1960).

The "terms themselves as hammered out at the bargaining table," not "The natural and foreseeable consequence," is in any event the better criterion of judgment.

[12] The General Laws have a dual aspect. From one point of view, they are work rules, governing relationships with employers. From another, they are, as noted in *Matter of ITU*, 86 NLRB 951, 970, "the conditions on which union members agreed to sell their services," and hence constitute a compact among the members "with respect to the acquisition or retention of membership"

Act this Court held that "substantial evidence is more than a scintilla, and must do more than raise a suspicion of the existence of the fact to be established". *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300. See also *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229. The amendments to the Act evinced a purpose to enlarge the scope of review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1950). As the Sixth Circuit has said, § 10(e) was "designed to eliminate the wholesale use of hearsay, the drawing of expert inferences not based upon evidence, and the consideration of only one part or one side of the case." *Pittsburgh S.S. Co.* v. *NLRB*, 180 F. 2d 731, 733, *affirmed*, 340 U.S. 498. Among the more recent opinions chiding the Board for continuing to decide on speculation and suspicion is *Morrison-Knudsen Co.* v. *NLRB*, 276 F. 2d 63, 73 (CA 9).

But, it is asserted, such agreements leave employees "confused" or "uncertain" or impose on them an "onerous burden" to know exactly what the agreement provides. This Court, in *United Steelworkers* v. *Warrior and Gulf Navigation Co.*, 363 U. S. 574, 578-582 discussed at length the reasons why collective agreements of necessity contain large areas of uncertainty, and why provisions for arbitrating disputes are there-

---

in the ITU as set forth in Section 8(b) (1) (A) of the Act. (R. 330). Insofar as the latter aspect is concerned, they are removed from Board scrutiny. 93 Cong. Rec. 4398-4402, 2 Legislative History of the Labor-Management Relations Act 1139-1143, (hereinafter cited as "Leg. Hist."). *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 620; *Matter of International Typographical Union*, 86 NLRB 951, 955-957, *aff'd* 193 F. 2d 782, 800 (CA7); *NLRB* v. *Amalgamated Local 286, etc.*, 222 F. 95, 97-98 (CA7). The exact reach of this proviso can best be explored when, and if, the Board asserts that some General Law has been unlawfully applied.

fore essential. To leave an employee in an uncertain frame of mind does not "restrain or coerce" him, nor does it "discriminate" against him. Indeed, the Board itself regularly makes use of the same short-hand device. Its usual form of notice directs employers or unions not to discriminate "except to the extent permitted by Section 8 (a) (3)" of the Act. In this single phrase, it subsumes the decisional law dealing with causes for discharge, dual unionism, tender of dues, escape provisions, check-off arrangements, union security clauses, fines and assessments and the myriad other subject matters dealt with in over 120 volumes of reports. It has shown no concern for the "onerous burden" this places on employees in determining what the notice in fact means. As the Court of Appeals for the District of Columbia said in *Honolulu Star-Bulletin*,

> "... the Board's language in its own order demonstrates the inevitability of some uncertainty and confusion in this general area. The Board twice, in the 'Notice to All Employees' which it required to be posted, directs the company to recite an abjuration of certain activities 'except to the extent permitted by Section 8 (a) (3) of the Act.' Counsel pointedly queries whether the latter quoted expression is less confusing than the phrase 'not in conflict with federal ... law'. In this connection we are led to inquire: What could be more confusing to rank-and-file employees than an official ruling that a contract which specifically says they need not be members of a union means that they must be members?" 274 F. 2d at 570.

Manifestly, the Board is attempting to lay down a rule that a collective agreement which does not spell out in full detail all matters which may arise, in a manner consistent with law and Board decisions (presumably with loose-leaf supplements as Board decisions

change existing law), is *per se* invalid.[13] This must be done with sufficient precision so that not only the parties, and the Board, and the Courts, will have no doubts, but in such manner that the most obtuse and illiterate employee will be clear, and it is the Board and the Board alone which can read his mind. This is not *expertise;* it is an asserted clairvoyance. It is a burden collective bargaining cannot bear, for there is no possible way in which the parties to agreements can anticipate what the Board may read into the mind of hypothetical employees.

It is, in any event, a will o' the wisp search. No matter what its terms, any agreement can be illegally administered; for example, an agreement granting vacations with pay would, of course, be unlawfully applied if these benefits are extended only to union members.[14] And while there is a presumption that the citizen knows the law, this has never been pushed so far as to require him to state it correctly, under penalties if he errs. Cf. *Lambert* v. *California,* 355 U.S. 225, 228. As Judge Hincks noted in *News Syndicate,* at page 330, "In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal be-

[13] In its brief in the *Honolulu Star-Bulletin* case, the Board said, "Clearly, if this guarantee [Section 7] is to be meaningful, employers and unions must so word their collective bargaining agreements that employees will know with certainty if union membership is required to hold a job." Brief for Respondent, CADC No. 15,044 at p. 17.

[14] If the present course of Board decisions is followed, we may anticipate a ruling that "The clause granting vacations with pay is clearly unlawful since it does not expressly provide that these benefits are to be extended equally to union and non-union men. In any event, vacations with pay clearly encourage union membership and are therefore illegal *per se. Radio Officers* v. *NLRB, etc. . . .*"

cause it failed affirmatively to disclaim all illegal objectives. *NLRB* v. *Mountain Pacific Chapter* . . . 270 F. 2d 425, at 431".

Furthermore, such specificity is quite impossible of achievement. In this case, the complaints (R. 5, 15) attacked the contract provisions and the General Laws dealing with "unfair goods." The petitioners defended them. While the case was in litigation, this Court recounted at length the "checkered career" of this issue, in *Carpenters' Union* v. *NLRB*, 357 U. S. 93, 101-104 (1958) and held such clauses lawful. This attack was thereupon quietly dropped. It is true that from 1947 to 1958 the "ordinary employee" was uncertain whether this clause might be lawfully applied; so were the parties, the Board and the courts. Is it now a condition of maintaining lawful agreements that the parties correctly anticipate future decisions?

The impossibility of avoiding uncertainty in this area is best illustrated by the utter confusion of the personnel of the Board. We attach hereto as Appendix "B" a tabulation, setting forth the sections of the General Laws which have been attacked at various stages of the numerous cases in which the Board has required the ITU to litigate and relitigate these issues. It will be observed that their number varies from none to thirty-seven (with a *caveat* that this does not exhaust the list) and that *no two agree*. Singled out for special attention, for example, has been Article I, Section 1, of the General Laws, which provides that apprentices must prove to the satisfaction of the local union that they are at least sixteen years old when they begin work. In *Alpert* v. *ITU, et al.*, 161 F. Supp. 427 (DC Mass., 1958) this rule, obviously designed to prevent the exploitation of child labor, was attacked as unlawful on the

ground that "it is not properly part of a collective bargaining contract fixing terms and conditions of employment".[15] Included in the attack have been the provisions of Article XIV[16] that the operation of any General Law is suspended in circumstances in which its enforcement would entail a violation of Federal or State law. (R. 328).

Even if we accept the Board's premises *in toto*, a violation of the Act is still not made out, for we assert that "foreseeable employee reaction"[17] to *this* agreement, even if the Board's guessing-game theory be adopted, would be that it is entirely lawful. The issue in this case is not, as it was in *Red Star Express, supra*, whether a "savings clause" removes the coercive effect of an unlawful union-security provision;[18] *it is*

---

[15] Quoted from "Petitioner's (General Counsel's) Comments on Alleged Revisions of ITU General Laws", filed in that case, page 2.

[16] See Joint Appendix in *Honolulu Star-Bulletin* v. *NLRB*, CADC, No. 15,044, p. 91.

[17] The phrase is the Board's in its petition for certiorari in *News Syndicate*, No. 339, this Term p. 11.

[18] The *Red Star Express, supra*, line of cases are not even authority for the proposition for which the Board cites them. In each, a vague savings clause purporting to salvage as much union security as possible was held not to legalize a union security clause *invalid on its face*. There is not here the problem, present in those cases, of negating "the coercion that would follow from the renewal of (an earlier illegal union-security agreement)", *Red Star Express*, 196 F 2d at p. 81, since there were here no earlier illegal union security agreements. Even the Board, in some cases, has stopped short of the "incorporation by reference" technique urged on the Courts of Appeals. See *Zangerle Peterson Co.*, 123 NLRB 1027, 1028; *American Dyewood Co.*, 99 NLRB 78, 79; *New Orleans Laundry, Inc.*, 100 NLRB 966, 967-68; *Keystone Coat, Apron & Towel Supply Co.*, 121 NLRB 880.

whether the union's proposals in fact, contained such clauses. They contained no union security provisions whatever. The Worcester proposal, in this respect identical with that at Haverhill, stated in Article 1, Section 2 (R. 347) that all composing room work was to be done only by journeymen and apprentices. Article 1, Section 6, (R. 349) defined journeymen solely in terms of competence and experience, and without reference to union membership or non-membership. It is a standard that "is tied not to union membership but to [non-discriminatory] competency qualifications." *Kansas City Star Co.*, 119 NLRB 972, 986. See also *News Syndicate* at 331-334. The testimony is uncontradicted that "journeyman" does not mean "union member". (R. 267). The agreement thus makes clear on its face that competency and experience alone, and not union membership or nonmembership, are requirements for employment. Only an irrationally suspicious person would look further.

And if such an employee did, his fears would still be assuaged. Insofar as the Laws clause is concerned, no literate employee could overlook, as the Trial Examiner and the Board here did, the existence of the "not in conflict with federal or State law" proviso. And if the employee were still not at ease, his reading of the General Laws would bring him to Article XIV, stating that "in circumstances in which the enforcement or observance of provisions of the General Laws would be contrary to public law, they are suspended so long as such public law remains in effect." What evil suspicions the Board must attribute to American workers to find that despite these reassurances these contract proposals would "restrain or coerce"!

The form of Order adopted by the Board, and enforced by the Court below, has an illuminating substantive aspect. It will be observed that that Order forbids "insistence upon acceptance of the Respondent Union's . . . general laws clauses . . ." (R. 482, 483). As shown in Appendix "B", however, the great bulk of the General Laws have not been attacked in any proceeding. In *Honolulu Star-Bulletin* and *News Syndicate*, the Board entered an Order directing that the Union notify the employer, the foreman, and the employees, which of the General Laws were to be set aside (without specifying which), thus leaving us the perhaps over-optimistic hope that some might still lawfully be applied. Here everything goes out. We would surmise that the reason for this must be that the Board here was dealing only with a contract proposal, and not, as in *News Syndicate*, with an executed agreement. It could not predict, therefore, which of the General Laws might be inoperative because the subject was one concerning which "provision is made in this contract," (R. 351, 398) and hence was driven to the expedient of outlawing the clause in its entirety. This patently illegal form of Order demonstrates some of the consequences that must inevitably flow from recognizing in the Board a power to ride herd, not alone on collective agreements, but on proposals put forward in the course of negotiations.

The holding that the making of a proposal in the course of bargaining negotiations constitutes an "attempt" at discrimination within the meaning of Section 8 (b) (2) must rest on assumptions that the proposal cannot and will not be altered in the course of the negotiations, that no other section of the completed agreement will alter or vary the meaning of the pro-

posed language, that the employer will execute an agreement in the form requested, and that discrimination will of necessity thereafter occur pursuant to the agreement. This distorts the meaning of "attempt" far beyond recognition.

This Court, on four separate occasions, has reminded the Board that it is not its function to supervise the language of collective agreements. *NLRB* v. *American National Insurance Co.*, 343 U. S. 395, 404; *Carpenters' Union* v. *NLRB*, 357 U. S. 93, 108; *Teamsters Union* v. *Oliver*, 358 U. S. 283, 295; *NLRB* v. *Insurance Agents*, 361 U. S. 477, 490, 498. Even the Board purports to agree. *United Telephone Co. of the West*, 112 NLRB 779, 781. Despite these holdings, the Board now seeks to go the further step of supervising the language of contract proposals put forth in the course of negotiations. The proposals "show respect for the law and not defiance of it. The parties, who could not foresee how some of the provisions of the statute would be interpreted, proposed to go as far toward union security as they are allowed to go, and this is their right; and they proposed to go no farther, and that is their whole duty." *NLRB* v. *Rockaway News*, 345 U. S. 71, 78-79.

2. The Foreman Clauses Are Valid

These clauses, as proposed in the Worcester and Haverhill negotiations, read:

> "The operation, authority, hiring for and control of each composing room shall be vested exclusively in the office through its representative, the foreman, who shall be a member of the Union. . . . The Union shall not discipline the foreman for carrying out written instructions of the publisher

or his representatives authorized by this agreement." (R. 350, 397, 403).[19]

The Court below noted (R. 523) that "in the Haverhill case the foreman clause was not a key issue." The Trial Examiner found, and his finding was not disturbed, that at Worcester "the Company had no objection to his (the foreman) being a Union member, but would not agree to make Union membership mandatory" (R. 432). The foremen in both plants were Union members (R. 36, 49, 237). Yet, the Board found, and the Court sustained its finding, that the demand for these clauses constituted a violation of Sections 8 (b) (1) (B), 8 (b) (2) and 8 (b) (3).

The Court below observed that the Board's findings with reference to these clauses are "fragmentary and far from clear" (R. 521). Under the well-settled rule of *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 196-7; 318 U. S. 80, 93-95 and *U. S.* v. *Chicago, M., St. P. and P. R. Co.*, 294 U. S. 499, 511, this required at least a remand to the Board for clarification, as the unions pointed out by petition for rehearing.

That the Board's findings should not be clear is hardly surprising, in view of the explicit language of Section 2(3), 2(11) and 14(a) of the Act,[20] which con-

---

[19] In the Haverhill proposals two clauses dealt with the duties of the Foreman, and the disavowal of disciplinary power is in slightly different language.

[20] Section 2(3) defines "employee" to exclude "supervisor", in turn defined in Section 2(11). Section 14(a) provides that "*Nothing* herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." (Emphasis supplied).

template that employers may lawfully require their foremen to be, or not to be, Union members and the explicit legislative history to the same effect. As Senator Taft noted, the purpose of these amendments was to restore foremen "to the basis which they enjoyed before passage of the Wagner Act" 93 Cong. Rec. 3952, 2 Leg. Hist., 1008, and that foremen under these amendments, "may form unions if they please, or join unions" (*id.*).

a. Section 8 (b) (1) (B).

Section 8 (b) (1) (B) makes it an unfair labor practice for a union to "restrain or coerce . . . an employer in the selection of his representatives for the purposes of . . . the adjustment of grievances."

Manifestly, on the facts of this case, there was no "restraint or coercion" of the employers as to their selection of a foreman. Both companies had foremen who were union members (R. 36, 49, 237); there was no proposal that they be changed, even though at Worcester the Union had serious grievances against the foreman under the contract. (R. 194-198, 237; 431). There was thus not, in fact, any effort to influence (let alone "restrain or coerce") the employers in their selection of a foreman.

The critical holding of the Court below on this issue was that "Not only would the clause as proposed by the unions limit the employers' choice of foremen to union members, but it would also give the unions the power to force the discharge or demotion of a foreman by expelling him from the Union." (R. 521-2). This holding is wrong in both its assumptions. The clause would *not* limit "the employers' choice of foremen to union members" (though if he were not a member at

the time of selection the clause would require him to become a member). It stated that "The operation, authority, hiring for and control of each composing room shall be vested exclusively in the office through *its* representative, the foreman . . ." (R. 350, 397, emphasis supplied) thus making it clear that the selection of its foreman was solely the choice of management. And the Court's second assumption that this "would give the unions power to force the discharge or demotion of a foreman by expelling him from the Union" is squarely in conflict with the proposal which provides that the Union shall not discipline the foreman for carrying out his employer's instructions (R. 350, 403).

But the real vice of the Court's analysis is that, once again, it attempts to project contract proposals into a complete agreement and then to decide disputes under such an agreement which have not, and may never, arise. The proposals provided full machinery for arbitrating "all disputes which may arise as to the construction to be placed upon any clause of the Agreement" (R. 352-53, 399).[21] Had these proposals been accepted, and had the employer proposed to hire a nonunion man as foreman, or had the Union attempted to discipline the foreman for carrying out his duties under the agreement, the parties would have their normal recourse to arbitration to resolve the dispute. To determine the legality of proposed contract clauses

---

[21] The record shows that these procedures were actually followed at Worcester. (See p. 33, n. 22, *infra*). "There is no surer way to find out what parties meant than to see what they have done." *Brooklyn Life Insurance Co.* v. *Dutcher*, 95 U.S. 269, 274; "the practical interpretation of a contract by the parties to it . . . is deemed of great, if not controlling, influence." *Old Colony Trust Co.* v. *Omaha*, 230 U.S. 100, 118.

by deciding hypothetical disputes under them which have not yet arisen is to stand the collective bargaining process on its head. Cf., *Evening Star Newspaper Co.* v. *Columbia Typographical Union, No. 101,* 141 F. Supp. 374, *aff'd* 233 F. 2d 697 (CADC).

In adopting Section 8(b)(1)(B), the Congress was primarily concerned with union demands for industry-wide bargaining. 93 Cong. Rec. 3953-54, 2 Leg. Hist. 1012 (remarks of Sen. Taft); 93 Cong. Rec. 4266, 2 Leg. Hist. 1077 (remarks of Sen. Ellender); and 93 Cong. Rec. 4897, 2 Leg. Hist. 1339 (remarks of Sen. Thomas, Utah). Additionally, it was concerned with union demands that "We do not like Foreman Jones and therefore you have to fire him or we will not go to work" (93 Cong. Rec. 3953, 2 Leg. Hist. 1012).[22] The Congress had no desire to change accepted practices in the building, maritime, printing and other industries where foremen have traditionally been Union members. Sen. Rep. No. 105, 80th Cong. 1st Sess. pp. 5, 19, 1 Leg. Hist. pp. 411, 425. Manifestly, the practices sought to be curbed by the Congress are not present here, and there is nothing in the legislative history to indicate that the Congress desired to curtail the right to strike granted by Section 13 for a contract clause requiring foremen to be Union members, a clause which it expressly made lawful under Section 2(3), 2(11) and 14(a) of the Act. *NLRB* v. *Drivers Local Union*, 362 U. S. 274, 282;

---

[22] Nothing approaching such a demand was here present. At Haverhill there was no disagreement at all on this issue, as the Court below held (R. 523). At Worcester, the local union members had abundant provocation to ask the dismissal of the foreman for violation of rules (R. 431), one of which was a principal cause of the strike (R. 194-198, 224), and made no such proposal. The issue was taken to arbitration, which had not been concluded when the strike began (R. 431).

NLRB v. *Insurance Agents*, 361 U. S. 477, 488-90. The decision in *American Newspaper Publishers Ass'n* v. *NLRB*, 193 F. 2d 782, 805 (CA7), *cert. den.* 344 U. S. 816 was expressly rested on findings that these proposals were part of a "general scheme" to achieve closed shop conditions.

That the imposition of a condition, such as a requirement that the foreman be or become a union member, does not violate Section 8 (b) (1) (B) is shown by *NLRB* v. *Garment Workers Union*, 274 F. 2d 376 (CA3), where the Court upheld a rule of the Union which forbade dealings with an employer representative who had previously been employed by the Union. Indeed, that case is nearer to the statutory prohibition than this, for the effect of the rule there would be to prevent such a person from representing the employer, while the contract proposal here advanced would allow anyone selected by the employer to represent him, subject to the condition that he become a union member if he were not already one.

b. Section 8 (b) (2).

The holding of the Trial Examiner on this issue, adopted by the Board, was a reliance on *Enterprise Industrial Piping Co.*, 117 NLRB 995, which was characterized as holding (R. 449, n. 6) that "where employers entrust their hiring to foremen who are members of the Union and bound by its laws, they in effect agree with the union, through the foremen who are agents of employers and the Union, to operate under a closed shop arrangement, which is a violation of the Act." This ground of decision was not adopted by the Court below, and it was specifically repudiated in *Honolulu Star-Bulletin*, *supra*, at page 570, and in *News Syndicate*, *supra*, at page 330. We believe we can add little

to Judge Hincks' discussion in the latter case. See also *Carpenters District Council* v. *NLRB*, 274 F. 2d 564 (CADC).

The record demonstrates that the ITU has made it clear that Union foremen are not expected to engage in discriminatory hiring practices.[23] In *Evans* v. *ITU*, 81 F. Supp. 675, 683 (ND. Ind.), the Court noted that a pre-existing oath of membership which, it was claimed, would require foremen to discriminate, had been abrogated. In 1953, by action of the ITU Convention, Article XII, Section 1, of the Constitution was amended to eliminate entirely a requirement that ITU members seek preference in hire for other members (R. 270, 271-2). The holding of the Board that the hiring of a Union foreman "in effect" creates a closed shop is precisely analogous to a holding that the hiring of a nonunion foreman, without more, is "discrimination" against Union members.[24] The *Enterprise* rule rests

---

[23] The legitimate economic reasons for requiring foremen to be Union members are spelled out in the record (R. 272-274, 299). And see *Evans* v. *ITU*, 81 F. Supp. 675, 683-685 (D.C., Ind.) (1948); *Matter of International Typographical Union*, 86 NLRB 951, 1019, *enf'd, American Newspaper Publishers Association* v. *NLRB*, 193 F. 2d 782 (CA 7). A comprehensive discussion of the role of foremen in the printing trades is to be found in Leiter, *The Foreman in Industrial Relations*, (1948) at pp. 57-60, and in Twentieth Century Fund, *How Collective Bargaining Works*, (1942) at p. 147.

[24] The Board's confusion on this issue is illustrated by the line of decisions in which it has held Union foremen to be acting as agents of the employers in voting in union elections; for example, *Bottfield-Refractories Co.*, 127 NLRB No. 28, 45 LRRM 1522; *Detroit Association of Plumbing Contractors*, 126 NLRB No. 165, 45 LRRM 1482. These holdings can be reconciled only on the ground that the Board asserts that the Union foreman is the agent of that party—employer or union—which will support the finding of an unfair labor practice.

on the assumption that Union foremen probably will discriminate. But "the law will never presume that parties intend to violate its precepts." *Owings* v. *Hull*, 9 Pet. 607, 628.[25] *Honolulu Star-Bulletin* (at page 570) and *News Syndicate* (at pages 331-334) both demonstrate that Union foremen can, in fact, perform their duties in non-discriminatory fashion.

The Court below adopted an entirely different ground, holding that a violation of Section 8 (b) (2) was made out, "for the effect of the clause would be to cause the employers to discriminate in favor of union men in appointing their foremen thereby encouraging aspirants for that position to join the union." (R. 522) It was improper for the Court to substitute its own *rationale, Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 196; 318 U. S. 80, 93-95, and the ground adopted by the Court appears to have been rejected by the Board. *F. H. McGraw & Co.*, 99 NLRB 695, 696; *Pacific Shipowners Association*, 98 NLRB 582, 596. It is in any event plainly wrong. The Congress, by removing foremen from the definition of "employee" in Sections 2(3), 2(11) and 14(a) of the Act, made it entirely clear that "discrimination" within the meaning of Section 8 (a) (3), and hence of Section 8 (b) (2), was not made out by requiring that foremen be, or not be, union members. As Judge Hincks noted in *News Syndicate*, at page 331,

> "The News, like any other employer, is of course entitled to employ only Union foremen, if

---

[25] "An employer is not guilty of unfair labor practices simply because his activity can all too easily be perverted into a system of unlawful discrimination. The unlawful act itself, not proximity to it, must be shown." *Pittsburgh-Des Moines Steel Co.* v. *NLRB*, 47 LRRM 2135, 2145 (CA 9, Nov. 15, 1960).

it so desires. Sections 2(3) & (11), 14(a) of the Act.... (citing cases)"

Since foremen, under the Act, are no longer employees, there cannot be discrimination in *employment* within the meaning of Section 8 (a) (3) by the imposition of such a requirement. It is therefore quite irrelevant that such a requirement might have the result of "encouraging aspirants for that position to join the union," for Section 8 (a) (3) "does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited." *Radio Officers* v. *NLRB*, 347 U.S. 17, 42-43.

We stress once more our conviction that an "attempt" to discriminate can not be made out by a proposal advanced in the course of collective negotiations. We do not feel that *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 405, fn. 15, where this important question was expressly "put aside," can properly be cited to the contrary. While union foremen may discriminate in favor of union men, just as nonunion foremen may discriminate against them, the Board has never asserted, and clearly lacks, the power to compel the employer to hire a union or nonunion foreman (even where actual discrimination has been proved) or to say what his duties shall be. "But a mere power to discriminate is not illegal as even the Board appears to recognize" (citing cases). *News Syndicate*, at page 330. Thus, no "attempt" is made out by this proposal.

3. Strikes For These Proposals Did Not Constitute a Refusal to Bargain Collectively, or Otherwise Violate the Act.

The Trial Examiner found (R. 456) that the Unions were "desirous of securing contracts with the Companies," and both the Board and the Court below accepted this finding. He held, however, that the demand for these assertedly illegal clauses was a refusal to bargain within the meaning of Section 8 (b) (3) and 8 (d) of the Act. The Court below, describing these as "clauses of honestly disputable validity at the time of the union action" (R. 525) nonetheless held that the unions "were acting at their peril" (R. 525-26) and enforced the Order.

Clearly if, as we have argued, these clauses are lawful, the finding of a refusal to bargain must fall with it, for the finding is based solely on asserted illegality.

Moreover, the petitioners here had the strongest reasons for proposing these clauses as lawful demands. They had been carefully reviewed in *Evans* v. *ITU*, 81 F. Supp. 675, 684 (N. D. Ind., 1948) and were specifically found to be "not unlawful." They had been before the Board in *Matter of ITU*, 86 NLRB 951, 961, 1017-1020, (1949) and had not been found unlawful; and before the Court of Appeals for the Seventh Circuit in *American Newspaper Publishers Ass'n* v. *NLRB*, 193 F. 2d 782 (1951), *cert. den.* 344 U.S. 816. Charges similar to those here were dismissed administratively without hearing in Case No. 9-CB-74 in April, 1955. (R. 259). In *Kansas City Star Co.*, 119 NLRB 972 (1957), the Board left undisturbed findings of a Trial Examiner that these clauses were lawful (see page 986, fn. 12). These views were subsequently vindicated in *Honolulu Star-Bulletin* and *News Syndicate*. For some thirteen years, therefore, these clauses

have been in use with the full knowledge of the Board and the General Counsel. On this record is it possible to say that the Union representatives did not urge the legality of these clauses in good faith? May a rational argument addressed to the legality of contract proposals constitute the basis for a finding of "bad faith"? Should the Board be encouraged to peer over the shoulders of the parties during negotiations and to intervene immediately when one of the parties proposes some language which, in the Board's view, might lead to a statutory violation? Is this "encouraging the practice and procedure of collective bargaining" which Section 1 holds out as the statutory objective?

Collective bargaining is sufficiently jeopardized when the Board asserts the power to direct, to the last dot of the i and crossing of the t, the language which must be contained in agreements as in *Mountain-Pacific Chapter, etc.*, 119 NLRB 883 (1957), *enforcement denied, NLRB* v. *Associated General Contractors*, 270 F. 2d 425 (CA9).[26] Now the Board attempts to push its power to oversee the entire collective bargaining process to a further remove; to deal, not with executed agreements, but with proposals put forward in the course of negotiations. Its assertion of power here thus goes two steps beyond the claim which this Court rebuffed in *NLRB* v. *Insurance Agents*, 361 U.S. 477.

We assert that the Board's finding of a violation of Section 8 (b) (3) cannot stand because the demanded

[26] We leave to the Court's imagination the impact on collective bargaining in this industry of the Board's effort to apply the *in terrorem Brown-Olds* remedy (115 NLRB 594) to the agreements here in question, in *News Syndicate*, 122 NLRB 818, 827 and *Honolulu Star-Bulletin*, 123 NLRB 395, 408. This condition has been largely alleviated by the reversal of those decisions.

clauses were lawful, because the petitioners reasonably and in good faith believed them to be lawful, and because the Board lacks power to inquire into the legality of contract proposals made by a union in the course of negotiations, since such proposals can neither "restrain or coerce" within the meaning of Section 8 (b) (1) or "attempt to discriminate" within the meaning of Section 8 (b) (2). The finding that petitioners were desirous of securing agreements should end the matter. See § 8(d).

We submit that the statement of the Court below, "the unions were acting at their peril, that is to say, at the risk of an enforcement order," (R. 525-26) unduly minimizes the practical consequences of a holding that the respondents violated the Act.[27] If these strikes are lawful, the strikers are entitled to reinstatement on a nondiscriminatory basis. *NLRB* v. *Mackay Radio Co.*, 304 U.S. 333. "However, the Court and the Board fashioned the doctrine that the Board should deny reinstatement to strikers who engaged in strikes conducted in an unlawful manner or for an unlawful objective. . . . These are the 'limitations or qualifications' on the right to strike referred to in § 13." *NLRB* v. *Drivers Local Union*, 362 U.S. 274, 281. If a strike for a contract loses its character as protected activity, because one or more of the demands, although of "honestly disputable validity", is later found to violate § 8 (b) (1) (B), 8 (b) (2) or 8 (b) (3), those sections are given "an expansive reading . . . which would adversely affect the right to strike" although the Congressional purpose to give them that meaning persua-

[27] Nor do the unions, whose lawful intention is conceded, take lightly a determination that they have violated the law.

sively appears neither from the structure nor the history of the statute. See *id.* at 282. Of course these employees engaged in strikes "at their peril". But under our system the risk which employees take is economic in character; the Board should not put its thumb in the scale. See *NLRB* v. *Insurance Agents*, 361 U.S. 477, 490 *Fourth*.

4. The Board's Order, as Enforced by the Court Below, Is Unlawfully Broad.

We have previously adverted (*supra*, p. 28) to the Board's Order, which, as enforced by the Court below, would proscribe "insistence upon acceptance of Respondent Union's . . . general laws clause . . ." As shown by Appendix "B", the great majority of the General Laws have not been challenged as illegal in any proceeding, including this. Hence, without a complaint, hearing, findings or order, the Board attempts to outlaw practices and conduct which are entirely lawful. This it may not do. *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 236, 238; *Morgan* v. *U.S.*, 304 U.S. 1, 18-19; *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 435-36; *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 341; *Hartford-Empire Co.* v. *U.S.*, 323 U.S. 386, 410; *Swift & Co.* v. *United States*, 196 U.S. 375, 396.

The Board's Order with respect to the foreman clauses is equally erroneous. That Order would forbid ". . . insistence upon acceptance of the Respondent Unions' . . . foreman . . . clauses . . ." (R. 462, 464). This wording is sufficiently sweeping to include the language of these proposals dealing with the duties of foremen and the "non-discipline" provisions, which have not been found to be unlawful. "The dividing line between what is lawful and unlawful cannot be left to

conjecture". *Connally* v. *General Construction Co.*, 269 U.S. 385, 393. If we assume that the Order is directed only to the requirement that foremen be Union members, it is still improper. The Board's thesis is that this provision is illegal because of the erroneous assumption that foremen would be bound by unlawful rules of the Union, rather than by the collective agreement and the requirements of Federal law. If this theory be adopted, it is then incumbent on the Board to state which of the rules are invalid, and why. It took a tentative step in this direction in *News Syndicate, supra* (see page 330) by directing that the Union advise the foreman which of the General Laws were not to apply. But, despite the urging of the General Counsel[28] and the unions that the Board specify which of the General Laws were invalid, the Board did not go the full length of stating which of them were invalid, and we again refer to Appendix "B" as demonstrating the impossibility of satisfying the Board on this issue. The Board's Order is tantamount to a direction that foremen are to be free to disregard all the General Laws, including, for example, those dealing with apprenticeship and priority matters, which have not been found to be unlawful in this or any other proceeding. "The Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice." *Carpenters' Union* v. *NLRB*, 357 U.S. 93, 108. See also cases cited *supra*, p. 41.

---

[28] See Record in #339, this Term, p. 701.

5. The ITU May Not Properly Be Held Liable With Its Local Unions.

The Trial Examiner and the Board found the ITU "chargeable with the unfair labor practices alleged and found herein" (R. 459). Reliance was placed on the fact that the locals demanded an "approvable contract" (by the ITU); that ITU approval of the contract proposals was required before submission to the employers; that two representatives of the ITU participated in the negotiations; and that the strikes were authorized by the ITU. (*id.*) On the basis of these findings, the ITU and its local unions were both ordered to "bargain collectively as the *exclusive* bargaining representative of the employees . . ." (R. 482, 484, emphasis supplied).

In making these findings, the Trial Examiner and the Board ignored the following undisputed evidence:

(a) The General Laws of the ITU provide (G.C. Ex. 15, p. 109; Article III, Section 1) that ". . . agreements [made by local unions] shall contain a clause excluding the International Typographical Union as a party thereto. It is the obligation of the local union to observe and enforce the terms of the contract."

(b) Only local unions have power or authority to enter into collective agreements and the ITU has none. (R. 98).

(c) One of the purposes of the ITU's review of agreements is to assure their legality. The ITU has believed this to be necessary to comply with the decree in the *ANPA* case, *supra*. (R. 283).

(d) In "approving" agreements, the President of the ITU ". . . pledges, as a matter of union policy only, its full authority under its laws to the fulfillment there-

of, without becoming a party thereto and without assuming any liability thereunder" (R. 370, 411).

(e) The contract proposals presented expressly provided that the local unions and the employers alone were to be parties to the agreements, (R. 347, 395) and that the ITU would not be (R. 370, 411).

(f) The limited right of the ITU to intervene in negotiations at the request of local unions is solely to attempt to settle the dispute, and not to represent the employees as bargaining representative (G. C. Ex. 15, By-laws, Article XIX, Section 1, p. 82; R. 96-98).

(g) Strikes may be called *only* by majority vote by secret ballot by local union members (G. C. Ex. 15, By-laws, Article XIX, Section 2, pp. 82-83; R. 97).

(h) The ITU constitutional procedures described above were followed in these negotiations (see, *e.g.*, R. 44-5, 100, 204, 224, 237).

The Court below adopted the Board's holding, and likewise did not advert to the above undisputed facts (R. 526).

Since *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 393-396 and *Coronado Co.* v. *United Mine Workers*, 268 U.S. 295, 299-305, it has not been doubted that international and local unions are discrete juridical entities. For the same reason that two bodies cannot as a rule of physics occupy the same space, it would seem logically precluded that two different organizations can both act as *exclusive* bargaining agents. Any holding that *both* can so act raises a host of practical problems. Who is to control the course of the negotiations? Must the ITU now, in spite of the explicit limitations on its authority imposed by its members, enter into agreements? Are local unions to be precluded

from proposing, as they did here, that the local union alone is to be a party to the agreement?

Section 9 (a) of the Act provides that "representatives designated or selected for the purpose of collective bargaining . . . shall be the exclusive representative of all the employees in such unit . . ." In this case there had been no election or certification by the Board. Whom the employees had selected to represent them is therefore a question of fact, to be determined by the common law rules of agency. Section 2(13) of the Act; H. Conf. Rept. No. 510 on H. R. 3020 (80th Cong., 1st Sess.) p. 36, 1 Leg. Hist. 540. The members of the ITU, by the adoption of explicit provisions in its laws, have conclusively indicated their intention that the ITU is *not* to act as a bargaining representative, and that local unions are. The members of the Haverhill and Worcester Union, by adopting proposals which would specifically exclude the ITU as a party, and make the local union the sole signatory, have demonstrated a like intention.[29]

In *Franklin Electric Co.*, 121 NLRB 143 (1958) the Board, at pp. 145-148, examined this question at length, on facts not dissimilar from those here, and concluded that the International Union was not responsible, without more, for actions of its locals.[30] Similarly, in *Di*

---

[29] The testimony is undisputed that Worcester Typographical Union had in the past entered into agreements *not* approved by the ITU and that no disciplinary action had in consequence been taken against it (R. 236). This testimony alone establishes the complete autonomy of local unions insofar as the power and duty to bargain is concerned.

[30] The Board there rejected the theory that a local "is merely an administrative arm" of its International. 121 NLRB 143 at 146-148. Accordingly, it determined that responsibility of the

Giorgio Fruit Co. v. *NLRB*, 191 F. 2d 642, 647-648 (CADC), *cert. denied*, 342 U.S. 869, it was held that constitutional provisions almost identical to those here involved "spell out a basic responsibility on the part of the local rather than a subordinate position of agency delegated by the National." In that case, the participation of representatives of the International Union in strike activities was held not sufficient to make the local the agent of the International. (See *id.* at 648).[31]

The theory of the complaints in this case (R. 4, 13), adopted by the Board (JA 458-9), was not that the locals were the agents of the ITU, or that the latter was responsible under the doctrine of *respondeat superior*, but rather that *both* were the bargaining representative of the employees. While *American Newspaper Publishers Association* v. *NLRB*, 193 F. 2d 782, 805, (CA 7), *cert. denied*, 344 U.S. 816, can properly be cited as holding that "the ITU and the . . . local and each of them were the exclusive bargaining representatives of the employees . . ." (193 F. 2d at 805), it should be noted that the Court there also held that this was "a question of fact to be resolved by the Board upon consideration of all of the relevant evidence bearing on the question" (*id.*). As we have indicated, the Board

International "must be determined by the ordinary rules of agency." *Id.* at 148. It also recognized that the constitution of the International determines the latter's relationship with its locals. *Id.* at 146-47. In their brief to the Board in the present case the unions relied heavily on this decision; yet the Board ignored the provisions of the ITU constitution and failed to make any findings on an agency basis.

[31] And see *United Brotherhood of Carpenters, etc.* v. *NLRB*, 47 LRRM 2254, 2258 (CADC, Dec. 15, 1960).

and the Court below ignored much, if not most, of the relevant evidence on this matter. In any event, we submit that the holding is clearly wrong, in that it is both a logical and practical impossibility for two agents to be the *exclusive* representative of the same employees. Nor can a violation be made out in the absence of a demand by the employers that the ITU bargain with them. *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 297-98. There is no such evidence in the record. Only by overturning authoritative and well-settled precedent, and adopting the patent fiction that the ITU and its local unions are a single entity, can this result be supported. The effect of the holding is to impose on employees by *fiat* an agent which they have not selected to represent them, and which they have specifically repudiated.

The fallacy of the Board's decision here is dramatized by the order to which its logic leads. The relevant part of the order in the Haverhill case, for example, reads:

> "I. The Respondents International Typographical Union, AFL-CIO, and International Typographical Union Local 38, AFL-CIO, and their officers, agents, and representatives shall: . . .
>
> "(b) Take the following affirmative action which the Board finds will effectuate the purposes of the Act:
>
> "(1) Upon request, bargain collectively as the *exclusive* bargaining representatives of the employees in the unit found to be appropriate." (R. 481-2 (emphasis supplied).

If the Gazette makes the request of both ITU and Local 38, how can both possibly comply? Alternatively, the Gazette is given the option whether it will require the ITU or the Local to be the exclusive bar-

gaining agent. How does it "effectuate the purposes of the Act" to let an employer choose the bargaining representative of his employees? This is a choice to be left to the employees; and indeed, we have shown that they made such a choice, and chose the local. Section 9 (a) of the Act provides that the choice of the employees, not of the employer or the National Labor Relations Board, shall be their exclusive bargaining representative. There is *no* evidence that they chose the ITU. The order against the ITU cannot stand.

CONCLUSION

This Court has had repeated occasion to remind the Board and others that the terms of collective agreements are for the parties to resolve. *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 404 (1952); *Carpenters' Union* v. *NLRB*, 357 U.S. 93, 108 (1958); *Teamsters Union* v. *Oliver*, 358 U.S. 283, 295 (1959); *NLRB* v. *Insurance Agents*, 361 U.S. 477, 490, 498 (1960). Despite these holdings, the Board now asserts the power to inquire into the validity of discrete proposals made in the course of negotiations, to draw wholly speculative conclusions as to the manner in which such clauses would be applied if they were contained in an agreement, to ignore entirely the manner in which they have been applied, to assert that the standard by which such proposals are to be judged is not their terms, but their supposed impact on a hypothetical group, and on this basis to characterize strikes, seeking a wide variety of objectives, as unlawful. For the reasons hereinbefore set forth, we urge that this is a gross perversion of the statutory purpose, arising

from a disregard of authoritative precedent, and that the decision below should be reversed.

Respectfully submitted,

GERHARD VAN ARKEL
HENRY KAISER
GEORGE KAUFMANN
1730 K Street, N. W.
Washington 6, D. C.

ROBERT M. SEGAL
ARTHUR J. FLAMM
11 Beacon Street
Boston 8, Massachusetts.

Attorneys for Petitioners

January, 1961

APPENDIX "A"

Statutory Provisions Involved

Sec. 2. When used in this Act—

• • •

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and • • • shall not include • • • any individual employed as a supervisor, • • •

• • •

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

• • •

Sec. 8 (a). It shall be an unfair labor practice for an employer—

• • •

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agree-

ment, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement

reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

* * *

Sec. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * *

Sec. 10 (e). * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * *

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Sec. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

APPENDIX "B"

	Complaint or Hearing	Intermediate Report	Board Decision
KANSAS CITY STAR and ITU MAILERS NO. 7 119 NLRB 972	Art. I § 3, 4, 9, 10 Art. III § 12 Total 5	Illegal Laws Not Discussed— **Laws Clause Approved** Total 0	NONE Total 0
HONOLULU STAR-BULLETIN 123 NLRB 395	Art. I §§ 13 Art. II §§ 3 Art. V §§ 1, 11 Art. VII § 1, 2, 3, 4, 5, 6, 7, 8 Art. VIII § 1 Art. XIV § 1 Total 14	Art. III § 1 Art. V §§ 1, 11 Art. X §§ 1, 2 Art. XIV § 1 Total 6	Art. V § 10 Art. VII § 1, 2, 5, 6 Art. VIII § 1 Board expressly reserved the right to pass on other General Laws in future cases. Total 6+
NEWS SYNDICATE and NEW YORK MAILERS 122 NLRB 818	Art. I §§ 3 Art. III §§ 12 Art. V §§ 10, 11 † Art. VII §§ 1, 2 † Art. VIII §§ 1 Art. X §§ 1, 2, 5, 6 † Attacked only in brief. Total 11	**Approved:** Art. I § 3 **Disapproved:** Art. III § 12 Art. V §§ 11, 12 Art. VII §§ 1, 2 Art. VIII § 1 Art. X §§ 1, 2, 5, 6 Total 10	Intermediate Report Approved. No General Laws specifically discussed. Board expressly reserved right to pass on other General Laws in future cases. Total ?
HAVERHILL GAZETTE and WORCESTER TELEGRAM 123 NLRB 806	Art. I § 4, 5, 7, 11, 19 Art. III § 12 Art. V §§ 1, 8, 9, 11 Art. VII §§ 1, 5, 6, 7 Art. VIII § 1 Art. X §§ 5, 6 Total 17	**Approved:** Art. I § 4, 5, 7, 11, 19 **Disapproved:** Art. III § 12 Art. V § 11 Art. VII § 1, 5, 6, 7 Art. VIII § 1 **Not Passed On:** Art. X § 5, 6 Total 8	"Apprenticeship and priority systems" disapproved without discussion of specific laws. Intermediate Report approved without discussion of specific laws. Total ?
HILLBRO NEWSPAPER PRINTING CO. and LOS ANGELES MAILERS 127 NLRB No. 71	Art. III § 12 Art. V § 10 Art. X § 1, 2, 6 Total 5	Art. III § 12 Art. V § 10 Art. X § 1, 2, 6 Total 5	Art. III § 12 Art. V § 10 Art. X § 1, 2, 6 Total 5
NEW YORK TIMES and NEW YORK MAILERS 2-CA-6432 2-CB-2504 2-CA-6433	Art. III § 12 Art. V § 11, 12 Art. VII § 1, 2 Art. VIII § 1 Art. X § 1, 2, 5, 6 Total 10	Trial Examiner recommended dismissal of the complaint. Total 0	NOT YET ISSUED
NEWSPAPER AGENCY CORP. and SALT LAKE CITY MAILERS 20-CA-1556 20-CB-658	Art. I § 3, 4, 11, 13 Art. III § 12 Art. V § 1, 11, 12 Art. VII § 1, 2 Art. VIII § 1 Art. X § 1, 2, 5, 6 Total 15	**Specifically Disapproved:** Art. I § 3, 13 Art. V § 11 Art. VII Art. VIII Others not specifically discussed. Total ?	NOT YET ISSUED
TRIBUNE PUBLISHING CO. and SAN FRANCISCO-OAKLAND MAILERS 20-CA-1553 20-CB-657	Art. I § 3, 4, 5 Art. II § 3 Art. III § 12 Art. V § 1, 11 Art. VII § 1, 2 Art. VIII § 1 Art. X § 1, 2, 4, 5 Total 14	Trial Examiner did not discuss individual Laws but entered order requiring Union to specify. Total ?	NOT YET ISSUED

ALPERT v. INTERNATIONAL TYPOGRAPHICAL UNION (DC MASS.) NO. 58-203-A, 161 F. SUPP. 427

Complaint	General Counsel's Brief in Opposition to Motion to Dismiss		Emphasized in Oral Argument	General Counsel's Supplemental Memorandum
Art. I § 4, 5, 7, 11, 19 Art. III § 12 Art. V § 1, 8, 9, 11 Art. VII § 1, 5, 6, 7 Art. VIII § 1 Art. X § 5, 6	Art. I § 11 Art. III § 12 Art. V § 7 Art. VII Art. VIII Art. X	Art. I § 1 (Apprentice required to furnish adequate evidence to Local Union to prove he is at least 16 years old.) Art. I § 5 (Apprentice requires approval of Local Union President to change Employers)		Art. I § 1, 2, 3, 4, 5, 7, 8, 10, 13, 14, 15, 16, 23, 24 Art. III § 1, 2, 5, 12 Art. V § 1, 2, 8, 9, 11 Art. VII § 1, 2, 5, 6, 7, 8 Art. X § 2, 3, 6, 7 Art. XI § 4, 5, 11, 13 General Counsel expressly reserved the right to challenge other General Laws in future cases.
Total 17	Total 6		Total 2	Total 37 +